

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

DIAGEO AMERICA SUPPLY, INC.,

Respondent.

**Docket No. FMCSA-2010-0003¹
(Eastern Service Center)**

ORDER APPOINTING ADMINISTRATIVE LAW JUDGE

1. Background

On October 6, 2009, the Maryland Division Administrator, Federal Motor Carrier Safety Administration (FMCSA), issued a Notice of Claim to Respondent, Diageo America Supply, Inc., proposing a civil penalty of \$19,590 for two alleged violations of the Federal Hazardous Materials Regulations (HMRs). Specifically, the Notice of Claim, which stated that it was based upon a September 14, 2009, “hazardous material shipper review compliance review at [Respondent’s] terminal in Halethorpe, MD,”² charged Respondent with: (a) one violation of 49 CFR 171.2(e)/180.605(c)(3), with a proposed civil penalty of \$7,300, for offering or accepting a hazardous material for transportation not properly classed, described, packaged, marked, labeled, or in condition for shipment;³ and (b) one violation of 49 CFR 173.24(b)(1), with a proposed civil penalty of \$12,290, for offering or transporting hazardous materials in a package that has an identifiable

¹ The prior case number of this matter was MD-2009-0152-US1263.

² Respondent’s Reply, however, indicated that the inspection took place at the premises of the transporter, New Perm Motor Express.

³ The charge in the Notice of Claim was: “Offering or accepting a hazardous material shipment for transportation not properly classed, described, packaged, marked, labeled, or in proper condition for shipment.” The word “shipment” following the words “hazardous material” and the word “proper” do not appear in the regulation.

release of hazardous materials to the environment.⁴

On November 6, 2009, Respondent replied to the Notice of Claim, denying the allegations and requesting a formal hearing. Respondent argued that the transporter, New Penn Motor Express, certified on its bill of lading that the material Respondent presented for shipping was properly packaged and in proper condition for shipment. Respondent maintained that it was unaware of the circumstance of how or when the shipment was damaged as found at New Penn's premises during the inspection. Respondent, however, stated that it hoped the matter could be resolved without need for a formal hearing.⁵ On January 5, 2010, Claimant consented to Respondent's request for a formal hearing, indicating that a hearing may be necessary to resolve the matters in dispute.⁶ Accordingly, this matter is being forwarded to the U.S. Department of Transportation's Office of Hearings.

2. Appointment of Administrative Law Judge

In accordance with 49 CFR 386.54, an administrative law judge is hereby appointed, to be designated by the Chief Administrative Law Judge of the Department of

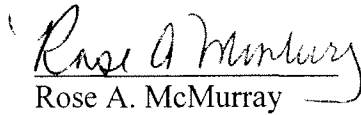
⁴ See Exhibit A to Field Administrator's Consent to Respondent's Request for Formal Hearing.

⁵ See Exhibit B to Field Administrator's Consent to Respondent's Request for Formal Hearing.

⁶ Section 180.605(c)(3) provides that each Specification 56 or 57 portable tank must be given a periodic inspection and test at least once every 2.5 years. It may not be readily apparent what the connection is between that section and section 171.2(e), which requires a hazardous material to be properly classed, described, packaged, marked, labeled, and in condition for shipment before it may be offered or accepted for transportation in commerce. Section 180.603(a), which states that each portable tank used for the transportation of hazardous materials must be an authorized packaging, may clarify the relationship. If the tank has not been periodically inspected in accordance with section 180.605(c)(3), then it is not an authorized packaging in accordance with section 180.603(a), thereby making the hazardous material not properly packaged or in condition for shipment, which would be a violation of section 171.2(e).

Transportation, to preside over this matter and render a decision on all issues, including the civil penalty, if any, to be imposed. The proceeding shall be governed by subparts D and E of 49 CFR Part 386 of the revised Rules of Practice and all orders issued by the administrative law judge.

It Is So Ordered.


Rose A. McMurray

Assistant Administrator
Federal Motor Carrier Safety Administration

2.24.10
Date

CERTIFICATE OF SERVICE

This is to certify that on this 25 day of February, 2010, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

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